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Filed Dec. 1, 1897.

SUPREME COURT OF THE UNITED STATES.

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WILLIAM L. LEDBETTER, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF AND ARGUMENT IN BEHALF OF THE PLAINTIFF IN ERROR.

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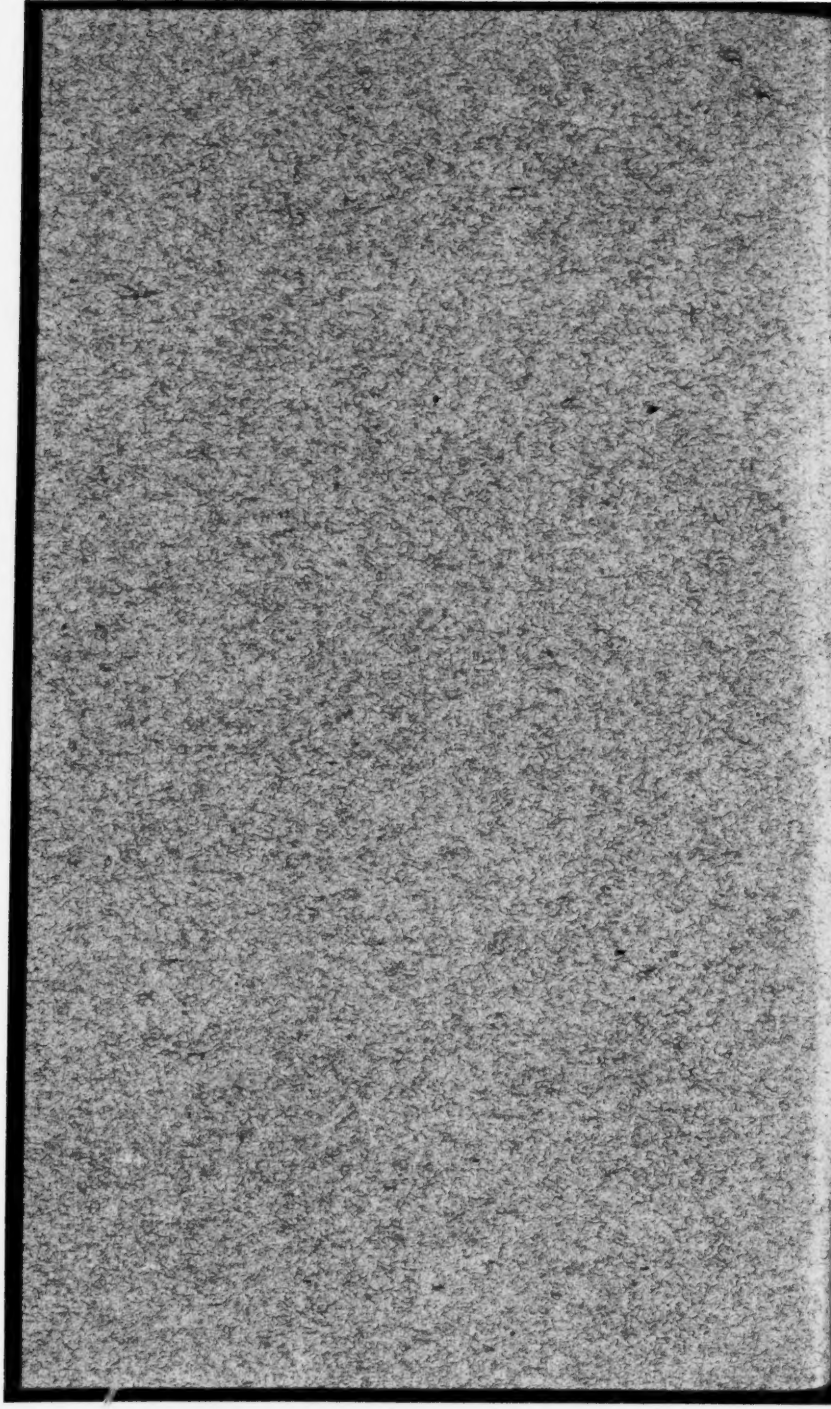

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STATEMENT OF CASE.

On the 28th day of April, 1896, the Grand Jury for the Southern District of Iowa, returned into court, an indictment against the plaintiff in error. The crime with which the defendant was charged, is the violation of Section 3242 and 3244, U. S. R. S., as amended by the act of March, 1879, Chapter 125, 20, St. at Large 333, relating to the carrying on the business of a retail dealer in liquors, and the payment of the special tax therefor.

The Statute is as follows: "*That any person who shall carry on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, or manufacturer of stills without having paid the special tax as required by law, shall for every such offence, be fined not less than $100 00, nor more than $5000 00, and imprisoned not less than thirty days, nor more than two years.* * * * * * * "*That retail dealers in liquors pay $25 00. Every person who sells or offers for sale foreign or domestic distilled spirits, wines or malt liquors, otherwise than as hereinafter provided, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors.*"

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The indictment charges that the defendant, "on the..... day of April, 1896, in the County of Appanoose, in the Southern District of Iowa, and within the jurisdiction of this court, did then and there, wilfully, unlawfully and feloneously *carry on the business of a retail liquor dealer without having paid the special tax therefor, as required by law.*"

The defendant was convicted and a motion in arrest of judgment was made, because the facts stated in the indictment, do not constitute an offence against the laws and statutes of the United States.

SPECIFICATION OF ERRORS.

The first objection urged to the indictment is, that it does not state any facts which constitute a crime, in that it fails to allege;

First: That the defendant *sold or offered for sale* liquors.

Second: That the liquors were either *foreign or domestic distilled spirits, wines or malt liquors.*

Third: That such liquors were sold or offered for sale in quantities *less than five wine gallons.*

Fourth: That such liquors were sold or offered for sale in such less quantities *at the same time.*

The second objection urged to the indictment is, that it does not comply with the constitutional requirement, and inform the defendant "of the nature and cause of the accusation" in that the indictment does not allege the facts and circumstances, with sufficient particularity, as to the time and place and means, to apprise the defendant of the crime with which he is charged.

The third objection to the indictment is, that it does not allege that any crime was committed at a date prior to the finding of the indictment.

BRIEF AND ARGUMENT.

It is necessary for every indictment to set forth the primary and individualizing facts disconnected from legal conclusions, and it must state the constituent facts and circumstances, necessary to bring the accused perfectly within the statutory provisions.

An indictment at common law as well as under a statute, must give the defendant the identifying information to which in reason and by the rule of good pleading he is entitled, and must acquaint him with the particular nature of the accusation. It must fully state the offence, and even if this cannot be done in the statutory words, it must be expanded beyond them. It must embrace all the elements which the law recognizes in the offence, whether they

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are mentioned in the statute, or come from it by construction, and must state the particular facts and circumstances, which render the defendant guilty of the offence charged.

1 Bishop on Crim. Proc., Sections 331, 623-626.

The opinion of Mr. Chief Justice Waite, in the well considered case of United States vs. Cruikshank, et al., 92 U. S., 542, 557, so completely supports the first and second objections urged to this indictment, and has been so often cited and followed, I will quote from it at length.

In considering the fifth, thirteenth, eighth and sixteenth counts in the indictment, he says:

"According to the view we take of these counts, the question is not, whether it is enough, in general, to describe a statutory offence in the language of the statute, but whether the offence has here been described at all. The statute provides for the punishment of those who conspire "to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States." These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of "every, each, all and singular" the rights granted them by the constitution, etc. There is no specification of any particular right. The language is broad enough to cover all."

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In United States vs. Mills, 7 Pet. 142, this was construed to mean that the indictment must set forth the offence 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in United States vs. Cook, 17 Wall. 174, that 'every ingredient of which the offence is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species—it must descend to particulars. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that

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it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

"It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larcency. So, too, it is in some states a crime for two or more persons to conspire to cheat and defraud another out of his property; but it has been held that an indictment for such an offence must contain allegations setting forth the means proposed to be used to accomplish the purpose. This, because, to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute; and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court may see that they are in fact illegal. * * * * * * * * * The accused has therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defence by motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the constitution, etc. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear - that is to say, appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offence alleged."

"Offences created by statute, as well as offences at common law, must be accurately and clearly described in an indictment; and if the offence cannot be so described without expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the indictment must be expanded to that extent, as it is universally true that no indictment is sufficient which does not accurately and clearly allege all the ingredients of which the offence is composed, so as to bring the accused within the true intent and meaning of the statute defining the offence. Every offence consists of certain acts done or omitted under certain circumstances; and, in

the indictment for the offence, it is not sufficient to charge the accused generally with having committed the offence, but all the circumstances constituting the offence must be specially set forth."

"Indictments for offences created and defined by statute must in all cases follow the words of the statute; and, where there is no departure from that rule, the indictment is in general sufficient, except in cases where the statute is elliptical, or where, by necessary implication, other constituents are component parts of the offence; as where the words of the statute defining the offence have a compound signification, or are enlarged by what immediately precedes or follows the words describing the offence, and in the same connection."

Authorities almost without limit, can be cited to show that it is necessary for an indictment to contain every element of the offence defined by the statute, and such facts and particular circumstances, as will give the defendant fair notice of the charge, and which will enable the court from the facts alleged and not from mere legal conclusions, to say that a crime has been committed, and to state such facts and circumstance with such a degree of particularity, as will enable the defendant to plead the indictment against a subsequent prosecution for the same offence.

Bish. Stat. Crimes, Sections 418-21-22.

1 Bish. Cr. Proc. { Sections 98a-519-526.
" 593-612-614 (2)-624 (1-2).

1 Whar. Cr. Proc., 2.
Whar. Cr. Pl. and Proc., Sec. 151-2-3-4.
Whar. Cr., Law, Sec. 132.
Whar. Cr , Law, Sec. 1841.
1 Arch. Cr., Law, Sec. 281-2-3.
1 Arch. Cr., Proc., Sec. 291.
41 Iowa, 580, State vs. Murray, et al.
9 Bis. 472, U. S. vs. Taylor.
124 U. S., 483, U. S. vs. Hess.
148 U. S., 197, Pettibone vs. U. S.
16 Blatchf (C. C.,) 350, U. S. vs. Bennett.
L. R. 32, B Div. 616, Bradlaugh vs. Reg.
32 U. S. 138, U. S. vs. Mills.
32 Fed. Rep., 147, U. S. vs. Morrisey.
7 Bis. 129, U. S. vs. Nunnemacher.
29 Fed. 287, U. S. vs. Wilson.
77 Va. 52, Boyd vs Comm.
5 Denio 76, People vs. Allen.
88 Mo. 631, State vs. Gabriel.

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3 McCord, Law, 533, State vs. Raines.
25 Tex. 654, State vs. Barns.
25 Tex. 664, Millican vs State.
35 Ind. 485, Quinn vs. State.
1 Mich. 217, People vs. Richards.
10 Mich. 310, People vs. Clark.
43 Mich. 417 Hall vs. People.
43 N. H. 83, State vs. Parker.

FIRST.

This indictment offends the most primary and elementary rule of good pleading, for it fails to allege even in the language of the statute, the facts which constitute the crime. It is only when a person *sells* or *offers for sale* certain specified liquors, to-wit, *foreign or domestic distilled spirits, wines or malt liquors* and in certain quantities, to-wit; in quantities *less than five wine* gallons, at the *same time*, and without paying the special tax of $25.00, as provided by law, that he can be guilty of violating the Internal Revenue law, by carrying on the business of a retail liquor dealer. The statute has defined the term "Retail Liquor Dealer," and it is only when the indictment employs the words of the statute the crime can be properly charged. Section 3242 R. S., fixes the penalty for violating the law, but this does not relieve the pleader from setting forth in the indictment, the words of the statute which defines the offence. The punishment under the statute is severe. It is made an infamous crime, and a conviction makes the penitentiary a fearful possibility to the defendant.

There is great reason therefore, that the indictment should state with particularity, the facts relied upon by the government for a conviction.

It would be as reasonable to claim that an indictment for murder or larceny, or embezzlement, or rape, charging the offence by these names would be good, as to claim that the general charge of "retail liquor dealer" defines any crime. It is a technical name given by the statute to a business, which when carried on *in a certain way*, requires the payment of a certain tax. The ordinary meaning of the words, does not contain the specific meaning put on them by the statute.

Webster defines liquor, as "any fluid or fluid substance, as water, blood, sap, juice and the like. "2. Especially alcoholic or spirituous fluids, either distilled or fermented, a decoction, solution or tincture."

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Retail is defined by the same authority as "the sale of commodities in small quantities or parcels, or at second hand."

There is nothing in the generic meaning of the words "liquors" and "retail", which reasonably indicates the kinds of liquors and the quantities forbidden by the United States statute, to be sold without the payment of the special tax of $25.00. Even fermented alcoholic liquors, such as cider, do not require the payment of the special tax.

The statute has made an artificial definition of the word "retail." There is nothing in the ordinary use of the word to indicate that a dealer who sells in quantities less than five gallons, is a "retailer," and one who sells in greater quantities, is a "wholesaler." The word has a specific meaning in the statute which is not found in its generic sense.

The statute only prohibits the business in being carried on in two ways, either by selling or offering for sale. Putting liquors on exhibition, for the purpose of advertisement, without selling or offering to sell, might in some cases be a method of carrying on the liquor business. Travelling men taking orders from samples, is one of the methods of conducting this business. But such a carrying on of the business, is not in violation of the law. How can the court, from this indictment, say, that the defendant ever sold or offered for sale any liquors whatever; how can it say, that the liquors were foreign or domestic distilled spirits, wines or malt liquors; how can it say that any or all of these liquors were sold in quantities less than five wine gallons at the same time. Yet all these facts must be proven to convict the defendant. They are the primary elements of which this offence is composed, and whatever is indispensably necessary to be proved to warrant a conviction, must be alleged in the indictment.

State vs. Wilson, 2 Mill, 135.

State vs. Philbrick, 31 Me., 401.

Every milkman, every grocery keeper, every druggist, is a retail liquor dealer, within the generic meaning of these terms, but such fact does not require them to pay a special tax to conduct their business. Whether or not a crime has been committed is a question of law for the court to determine from the facts alleged in the indictment, and it is not left to the decision of the prosecutor. As is tersely stated in U. S. vs. Cruikshank, *supra*; "It must be made to appear—that is to say appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offence alleged."

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The term "dealer" has been defined by various courts and text writers of recognized authority. The American and English Encyclopedia of Law, Vol. 5, at page 123, says: "A dealer is therefore one who makes a business of buying and selling; he is the middleman between the producer and consumer." Norris Bros. vs. Comm., 27 Pa. St., 494. "A dealer is one who buys goods, etc., and sells the same goods at a profit."

Barton vs. Morris, 10 Phila. (Pa.,) 360, "A farmer who sells the products of his farm and occasionally that of his neighbor at a market stand, is not a dealer. He does not buy he only sells."

Overall vs. Bezeau, 37 Mich., 560, "A dealer is one who makes successive sales as a business. One who owns a quantity of liquors and sold them in gross, is not a wholesale dealer within a revenue act; by doing so, he shows a determination not to be a dealer."

A few instances of selling liquors in small quantities by one having no bar-room and none of the usual appliances of liquor dealers, and with no intention apparent of defrauding the national revenue is not sufficient to convict one of carrying on the liquor busines without a license.

U. S. vs. Jackson, 1 Hughes, 531.
U. S. vs. Feigelstock, 14 Blachf., 321.

A grocer, who without obtaining a license for selling liquors purchases a barrel of whiskey for a customer, and enters on his books a charge against his customer for the price at which it was actually obtained from the liquor dealer, does not transgress the spirit of the revenue laws. U. S. Howell, 20, Fed., 718.

The gratuitous distribution of spirits at a gaming table does not constitute a retail liquor dealer in spiritous liquors. U. S. vs. Mickle, 1 Chanch (C. C.,) 268.

Supplying a friend as a matter of accommodation merely from liquors on hand for private use, is not carrying on the business of a retail liquor dealer, altho money is received for it.

U. S. vs. Rennick, 28th Fed., 847.
U. S. vs. Jackson, 1 Hughes 532.

Vinters may sell the wine of their growth at the place where it is made without paying the special tax. Sec. 5. Chapt. 125, 20 St. at Lg., page 334.

Apothecaries who use wines and spiritous liquors in the preparation or making up of medicine, are not required to pay the tax. Sec. 5, Chapt. 125, 20 St. at Lg., 334.

These cases show that it is impossible to charge any crime by the use of the words "carrying on the business of a retail liquor dealer," because the words have no necessary meaning either in the generic sense, or as construed by the courts, which makes the act described a violation of the Federal Statute.

In the case of Pettibone vs. U. S., 148 U. S., 197, Mr. Chief Justice Fuller, quotes with approval the language in the opinion of U. S. vs. Carll, 105, U. S., 611, as follows:

"In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

Tested therefore by the most elementary rule of pleading, that an indictment based upon a statute, must at least charge the crime in the language of the statute, this indictment utterly fails to allege any facts, which are defined by the statute to be a crime.

SECOND.

The accused has the right under the Sixth Amendment to the Constitution of the United States "to be informed of the nature and cause of the accusation." This has been held to mean (U. S. vs. Cruikshank, *supra*), that the indictment must furnish the accused with such a description of the charge against him, as will enable him to make his defense and avail himself of his conviction or acquittal, for protection against a further prosecution for the same cause.

Without seeking to apply the technical criticism of the old Common Law pleading to this indictment, we claim that even the language of the statute, and much less the language of this indictment, fails to furnish the defendant with the sufficient facts and circumstances of the crime with which he is charged.

The indictment charges, that on the ..... day of April, 1896, and in Appanoose County, in the Southern District of Iowa, the defendant carried on the business of a retail liquor dealer, without paying the special tax, as required by law.

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Under such a charge, the defendant has to defend his conduct during a period of three years, and over a territory equal to one-sixth the size of the State of Iowa.

It is a matter of judicial knowledge, that in the State of Iowa, laws have been enacted prohibiting the sale of intoxicating liquors. In many of the counties of the state, there are no saloons open for the sale of intoxicating liquors. Many of the violations of the Federal Statute arise where the liquors are carried around on the person, and the term "boot-legger" has been invented to describe this itinerant vendor of intoxicating liquors. Such violators are generally the worst scum of society, and their patrons little better, with whom the oath has no sanctity, and the character of their testimony generally as to sales made in solitary places, relieves them of any fear of prosecution for perjury.

A charge of violating the Internal Revenue Law, is an easy one to make against even a reputable citizen and furnishes an easy means to seek revenge. The defendant is tried in a court, sometimes over one hundred miles from his home, by a jury unacquainted with his standing among his neighbors, or the character of the witnesses. Without any knowledge of the witnesses or the nature of their testimony, unless the indictment furnishes him with reasonable information of the facts upon which the government relies, to prove him guilty, his reputation and liberty are placed at the mercy of any set of witnesses, who are willing to commit perjury. Learning for the first time at the trial, the names of the witnesses and the nature of the testimony, it is too late, and too far away from home, either to procure witnesses to impeach or contradict their testimony.

The particularity with which the courts require the indictment to state the facts, depends somewhat upon the nature of the offence and the seriousness of the charge. In U. S. vs. Mills, 7 Pet., 142, the court says: "There is not that technical nicety required as to form, (in indictments for misdemeanors) which seems to have been adopted and sanctioned by long practice in cases of felony * * * * but in all cases the offence must be set forth with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged." The crime charged in this indictment, is a felony, punishable by two years in the penitentiary and $5,000 fine.

We claim that it is at least necessary for the indictment to allege that the business was carried on *between certain dates*, and that the *locality* be designated, as accurately as possible, and certainly within the limits of the town or township.

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The Internal Revenue Department, in issuing the stamps for the special tax, in cities gives the street number of the building, and in small towns without street numbers the name of the town, and in the country the name of the township. The indictment ought to be, at least this certain and particular. In this indictment the place is limited only to Appanoose County and the Southern District of Iowa.

We also claim that justice to the defendant, requires that the indictment should in some manner show, the means by which the government will claim the defendant was violating the law. If it is claimed that the defendant was conducting a business with the usual appurtenances, with which liquors are usually sold, it should so be stated. If it is claimed that the sales were made from the person, it should so state, and give the names, so far as they are known to the Grand Jury, of the parties to whom the sales were made. The facts upon which the government relies for a conviction, are within its knowledge, and can be easily and suscintly stated in the indictment. Where the only evidence of carrying on the business, is the fact that sales were made to one or more persons, without having any place of business or any of the usual equipment for carrying on a business of this character, unless the names of the parties to whom the liquor is sold or offered for sale and reasonable particularity of time and place are given, it is absolutely impossible for the defendant to be prepared to meet the charge, and his conviction or acquittal, is no protection against a subsequent indictment for the same offence.

In Bishop's Crim. Proc. Sec. 578, the author referring to liquor cases says: "The indictment must charge an exact quantity." The Am. and Eng. Encyclopedia of Law at pages 762, 765 and 766, says that the same general rules as to certainty and particularity apply to cases of indictments for the illegal sale of intoxicating liquors, and the better opinion is, that kind or quality of the liquors sold, should be stated, and also that time and place are necessary to be given. In Heods case, 11 Grat. 819, it is said, that the defendant should be apprised of the place alleged, so that he may be prepared with proof, and in Boyle's case, 14 Grat. 694, it is further added, that the indictment should state the *mode of sale*, as inference can never supply a total want of averment in regard to an *essential part* of an offence, *but all the circumstances* must be stated. In two New Hampshire cases we have these significant statements. In every indictment, the offence should be so described as to make it *certain* what the government really relies upon, before trial, to support the

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accusation, what they have relied upon after trial, or for what a conviction has been had, if one be obtained.

State vs. Gray, 36 N. H., 359.

When the words used in an indictment to describe an offence are commonly used in a sense which does not necessarily import an offence, and they are used without any qualification, the indictment will be bad, though the same words in a more strict and technical sense may describe a criminal act.

State vs. Parker, 43 N. H., 83.

State vs. Schmidt, 31 Atlantic Reporter, 280. Where an indictment charged a sale by retail of intoxicating liquors contrary to the law. Held that the indictment is insufficient. "In no wise is defendant informed wherein the *unlawfulness* of his misconduct is supposed to lie. He is left to surmise. * * * * * * A conviction under such indictment would not insure the subsequent protection of the defendant, should his conduct be again questioned for the same act Association vs. Platt, 55 N. J., Law 557. This method of pleading *ignores the constitutional right to be informed of the 'nature and cause of the accusation.*" * * * * * Unless the statute describes the offence, the mere recital of nondescript words from the statute will not constitute in reasonable *completeness* a statement of the offence, so as to relieve the pleader from averring the *acts that go to make it up.*"

In the case of U. S. vs. Hess, 124, U. S., 483, Mr. Justice Field says: "Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances, as will inform the accused of the specific offence, coming under the general description with which he is charged," and in another place in the same opinion." "No essential of the crime can be omitted without destroying the whole pleading. The omission can not be supplied by intendment or implication, and the charge must be made directly and not inferentially or by way of recital." All the essentials as to sale, kind of liquors, quantity, mode of carrying on the business, time and place, are lacking in this indictment, and it would seem well nigh needless to multiply authorities.

State vs. Nicholson, 67 Md., 1.
State vs. Miller, 24 Conn., 522.
Cohen vs. People, 7 Colo., 274.
Sleom vs. State, 18 Fla., 903.
Woolsey vs. State, 14th Tex., App., 57.

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Pierce vs. State, 63 Md., 592.
State vs. Gabriel, 88 Mo., 631.
Enbanks vs. State, 17 Ala., 181.
State vs. Casey, 45 Me., 435.

We are aware of the rule of pleading, that where an offence is made up of a series of transactions, which cannot be enumerated without prolixity and danger of variance, they ought not to be required to be set out in the indictment, if the charge is otherwise fairly informative of the case to be met.

But we claim that in a case like this, the indictment cannot be fairly informative of the charge, unless it shows that the business was carried on at a certain *place, and between certain dates,* and the material circumstances as to the sale or offer for sale.

Moreover, the cases in which the foregoing rule has been applied, have been in nearly every case, which has come under our notice, indictments for misdemeanors. They have generally been cases for violations of local ordinances, and where the law made every offence of the series of transactions a misdemeanor, and where the defendant was tried in his home forum. They have been cases usually for selling intoxicating liquor without a license, and in each the indictment or information set forth the time, as between certain dates, and the place where the sales were made, and the manner of violation of the ordinance, was alleged to be *the sale of the intoxicating liquors.*

The term retail liquor dealer, as used by the pleader, is a conclusion of law, and is not a statement of fact, like the allegation of the sale of intoxicating liquors. There are certain words like "intoxicating liquors," "distiller," "common scold," "keeping a bawdy house," etc., which have a necessary meaning, and when the words of the statute defining the offences, are used in the indictment, they are generally fairly informative of the charge. Moreover, if the indictment qualifies the language, by such words as "within the meaning and intent of the law." or "as provided by law," and the statute sufficiently defines the words, it may be sufficient. For this reason we have not criticised the allegation "without paying the special tax as *provided* by law." It would be better pleading to allege the amount of the tax, to-wit; $25.00, but probably the allegation is sufficient.

Again tested by the following rule the indictment is bad.

"If the words of the statute embrace cases which it was not the intention of the legislature to include within the law, the indictment should show this is not one of the cases thus excluded."

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United States vs. 2 Curtis (C. C.,) 268.
In re. Mary Ann, 8 Wheat, 387.

The term "retail liquor dealer" in its general sense, embraces a large class of individuals, which by the sections following in the statute, and many decisions of the courts, are not intended to be included in this term, such as vinters, druggists, a single sale for accommodation, selling in greater quantities than five gallons, etc. In this respect, the indictment is insufficient, for it has been shown that the term, "retail liquor dealer" is of such a general nature, that it is in itself insufficient to meet the requirements of the law, as to certainty and definiteness of the language of an indictment.

In State vs. Melville 11 R. I., 417, the general principle is, stated clearly and concisely. "A criterion of the sufficiency of the indictment for a statutory offence, is that the averments should make it certain, that the act charged is the act forbidden by the statute, and so exclude any assumption that the indictment may have been proved and the defendant may still be innocent."

Where the offence consists in carrying on a business, the identity of the crime can only be shown by allegations of circumstances of time and place and mode of conducting it. If a defendant can be convicted upon a criminal accusation in which he is not informed, even in the language of the statute with how many crimes he is charged, or with any one circumstance attending any one of them, but only because he is a retail liquor dealer, where each specific sale may prove the crime, and the government may prove as many sales as it can, over a period of three years, and over a whole county, then indeed, as stated by Mr. Bishop in his work on Criminal Procedure, is this constitutional provision "a cable of sand," and gives the accused no protection.

THIRD.

The next objection urged to the indictment is, that the time when the crime is alleged to have been committed, is not at a day necessarily prior to the finding of the indictment.

The term of the District Court at which this indictment was found commenced on the 14th day of April, 1896. The indictment was presented by the Grand Jury and filed in court, on the 28th day of April, 1896. The indictment alleges that on the " . . . . day of April, 1896," the defendant did carry on the business of a retail liquor dealer, etc.

"Every indictment must allege a day and year on which the offence was committed. This is the Common Law rule prevailing

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in most of our states." Bishop Crim. Proc. Sec. 387. However, unless the time is a material element of the crime, it need not be proved as charged.

Every indictment must charge the offence to have been committed on a day or days certain, and these days must be prior to the finding of the indictment, and within the statute of limitations, otherwise no crime is alleged for which the defendant can be punished.

State vs. Pratt, 14th N. H., 456.
State vs. Miller, 79 Ky., 451.
People vs. McCardy, 68 Colo., 576.
State vs. Little, 6 Blachf. 267.
State vs. Rollet, 6 Ia., 535.
Williams vs. State, 12th Tex., App., 226.
State vs. Ingalls, 59 N. H., 88.

In the case of State vs. Beckwith, 18 Am. Dec. 46, the court says: "In the language of a man confessedly great, it is laid down as an undoubted principle in all the books that treat of this matter, that no indictment whatever, can be good, without precisely showing a certain year and day of the material facts alleged in it. 3 Bac. Abr., 561. It is also held by most or all of the ancient crown lawyers, that the time of the commission of offences is, in the general, necessary to be stated in the indictment, and especially where the time for the prosecution is limited by statute."

No day certain is alleged in this indictment, and what is more serious, is, that under the allegation of the ——— day of April, it might have been shown on the trial that the offences were committed either on the 29th or 30th of April, two days after the indictmen was found and returned into court.

In the case of U. S. vs. Conrad, 59 Fed., 458, Circuit Judge Goff held that a charge of an offence as committed on the ——— day of a month and year named is not defective, where *every day of that month was prior* to the finding of the indictment, and within the period of limitations applicable.

The conclusion necessarily follows, that if all the days of the month are not prior to the finding of the indictment, the indictment is bad. Undoubtedly the modern decisions have modified the old common law rules of pleading, but we cannot believe, that they have so entirely abrogated them, that it is not at least necessary to allege the time, at a date which will certainly be prior to the finding of the indictment.

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In these liquor cases, it is especially important, that the date be given. The payment of the tax makes the sales legal from that time on during the fiscal year. Defendant may come to the trial prepared to prove that at the time, he supposed the government will attempt to show that he was violating the law, he had paid the tax, or was working for another who had paid the tax, and be surprised by the testimony of the witnesses, who either by honest mistake, or wilful perjury may fix the date at a different time, and the defendant will not be prepared to meet the charge.

Tested ~~before~~ by the most elementary, the simplest, and therefore the best established rules of pleading, this indictment is insufficient to charge a crime, because;

1. It fails to allege the offence substantially in the language of the statute.

2. It fails to set out any of the essentials of which the crime is composed.

3. It fails to fairly inform the defendant of the nature of the charge upon which he is to be tried.

4. It fails to allege that the crime was committed on a date prior to the finding of the indictment.

We respectfully submit that the motion in arrest of judgment should have been sustained.

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